

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ORIGINAL

Before The Honorable Beth Labson Freeman, Judge

Cisco Systems, Inc.,)	Case Management Conference
)	
Plaintiff,)	
)	
VS.)	NO. C 14-05344 BLF
)	
Arista Networks, Inc.,)	Pages 1 - 38
)	
Defendant.)	San Jose, California
_____)	Thursday, November 5, 2015

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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Thursday, November 5, 2015

2:03 p.m.

P R O C E E D I N G S

THE CLERK: Calling case 14-5344, Cisco Systems, Incorporated versus Arista Networks, Incorporated.

Counsel, please state your appearances.

MR. PAK: Good afternoon. This is Sean Pak with Quinn Emanuel on behalf of Cisco.

THE COURT: Hello, Mr. Pak.

MR. NEUKOM: Good afternoon, your Honor. On behalf of Cisco, John Neukom. Also with me today is my colleague Matthew Dannon. And also with us today is Leah Waterland, who is the director of IP at Cisco.

THE COURT: Oh, welcome. Thank you.

MR. VAN NEST: Good afternoon, your Honor. Bob Van Nest of Keker Van Nest for Arista. I'm here with Brian Ferrall and Ajay Krishnan.

THE COURT: Nice to see all of you. All right.

Well, I asked a simple question and you blew it up into a full case management conference, so I guess I shouldn't stick my head in the sand and not know what's going on with all of you, so I appreciate you coming today.

I have a little housekeeping I want to start with 'cause that's why I asked to have this conference. There seems to be confusion about how the claims construction hearings are going to go and some confusion about the date that is referenced in

1 your papers.

2 My order and my calendar show your claims construction
3 hearing on February 5. And it's referenced in these papers
4 that it's February 26. So I don't know -- I don't think I'm
5 wrong, but I could be. But I looked at the case management
6 order just now. So I want to make sure -- Is that what
7 everyone's thinking? Because in the joint statement, it's
8 referenced in the chart as February 26.

9 **MR. NEUKOM:** That is consistent with Cisco's
10 understanding, your Honor, February 5th.

11 **THE COURT:** Excellent.

12 Okay. Then what I was concerned about is you -- the --
13 the last statement that I got from you indicated that if there
14 was going to be a separate hearing -- and I didn't actually
15 even know what you were talking about there. So let's --

16 **MR. VAN NEST:** I think --

17 **THE COURT:** -- clean that up.

18 **MR. VAN NEST:** I think we all made a mistake. I
19 think everyone's contemplating a separate hearing on *Markman*,
20 and February 5th is the date.

21 **THE COURT:** Good.

22 **MR. VAN NEST:** I thought we had set aside the day
23 before for tutorial.

24 **THE COURT:** It's the week before.

25 **MR. VAN NEST:** The week before. But the tutorial is

1 separate --

2 **THE COURT:** Yes.

3 **MR. VAN NEST:** -- and then the *Markman*. But I think
4 we all were in error. It was a joint submission, but I think
5 that's the source of the confusion.

6 **THE COURT:** Okay. So this submission had the wrong
7 date, and that's not a problem. I just wanted to make sure
8 you all, if you were planning on a different date, could get
9 your witnesses in line, so that's good.

10 But this other part, yes, I hold a separate tutorial.

11 **MR. VAN NEST:** Right.

12 **THE COURT:** And that is a week prior. I find it
13 really helps me to think about your technology for a few days
14 and then come back and work and have the *Markman* hearing. And
15 you're asking for four hours total; is that correct?

16 **MR. VAN NEST:** I think that's right, your Honor.

17 **THE COURT:** Okay.

18 **MR. NEUKOM:** Yes, your Honor.

19 **THE COURT:** Mr. Neukom?

20 All right. That is all fine. And I may be in a criminal
21 trial that week, but one never knows. And so I probably -- I
22 may move your tutorial to the afternoon of the prior week.
23 But the hearing, I may just have -- be dark in the criminal
24 case to give you the full day, 'cause four hours is going to
25 really eat into the afternoon, and that works for me. I'll

1 work on that.

2 Let's now get to the issues that seem to be pending and --
3 are causing me some concern. Mr. Van Nest, at your client's
4 request, this was put on a pretty short schedule, actually
5 driven by the copyright claims more than the patent claims.

6 And given the filing of the IPR petition, I'm a little
7 concerned that this may be overly ambitious, although I'm not
8 deciding a stay issue right now. I am just very concerned
9 about how the case seems to have blown up since we set this
10 trial date in -- next summer.

11 **MR. VAN NEST:** That -- That's right, your Honor. And
12 we share that concern. Remember, that the case was set on
13 a -- on a -- on an expedited schedule at Cisco's request, not
14 at our request.

15 **THE COURT:** Oh, not at your request. You're right,
16 you're right.

17 **MR. VAN NEST:** And what's happened, then, just
18 briefly outline it, we've had lot of trouble getting discovery
19 on track. We sent a very simple interrogatory back in April
20 asking for the origins of these commands. Got nothing over
21 the summer. Fought all summer long. Finally went to Judge
22 Grewal. He granted our motion in full.

23 Just about two weeks ago, we got a response from Cisco
24 finally listing 137 authors. And that's not all. There's
25 another 160 commands for which they can't find an author.

1 **THE COURT:** Hmm.

2 **MR. VAN NEST:** And so what we've done is two things.
3 We've -- We've ask your Honor to hear a motion to continue the
4 trial --

5 **THE COURT:** Yeah.

6 **MR. VAN NEST:** -- some five months. And the only
7 request I have in that regard today, your Honor, is that the
8 earliest date we could get for a hearing on that motion was in
9 late February.

10 **THE COURT:** Well, that's okay, because the earliest
11 date you could get for trial would be the fall of 2017.

12 **MR. VAN NEST:** There you go.

13 **THE COURT:** So that's not a problem.

14 **MR. VAN NEST:** Okay. Fair enough.

15 **THE COURT:** And Cisco has a problem -- a concern with
16 that, and I don't know whether Mr. Pak wants to respond or
17 Mr. Neukom. I am -- I know that -- that this sort of shifting
18 sands as to who wants to sever, I have a general philosophy
19 that cases are not better by making two cases out of one.

20 But I'm a little concerned here that -- though we may need
21 to be on parallel tracks, and I don't understand the nature
22 and overlap between the patent claims that -- that Cisco is
23 making and the copyright claims to know whether severing would
24 be beneficial actually at this point to both sides or not.

25 **MR. VAN NEST:** Well, our view --

1 **MR. PAK:** Your Honor, may --

2 **THE COURT:** Sure. Go ahead.

3 **MR. PAK:** Sean Pak, your Honor, yes.

4 Why don't I begin briefly, and then I'm going to turn it
5 over to Mr. Neukom, who's there in person --

6 **THE COURT:** Okay.

7 **MR. PAK:** -- and can address all the concerns.

8 Your Honor, we were here at the first CMC, and if you
9 recall we had actually asked for bifurcation of the copyright
10 claims --

11 **THE COURT:** Right.

12 **MR. PAK:** -- from the patent claims. And there was
13 back and forth about that. And what we had ultimately decided
14 was given the availability in the summer and given the
15 arguments that were presented by Mr. Van Nest's colleagues
16 that there was substantial overlap between the patent and the
17 copyright case and all the judicial efficiency that comes from
18 having one trial rather than two, we had agreed to do trial in
19 a consolidated fashion in the summer of next year, and that
20 was the first availability that was available on your
21 calendar.

22 **THE COURT:** Yes.

23 **MR. PAK:** We also realized, then, doing in so that
24 from Cisco's perspective, every single day that we have these
25 products that are using admittedly copied technology from us

1 is a day that -- that causes us concern and has huge impact in
2 the marketplace.

3 **THE COURT:** Yeah.

4 **MR. PAK:** So we're very interested in getting to
5 trial on an expeditious basis. We've worked very hard to make
6 that happen.

7 With respect to the -- the question now before you, your
8 Honor, in terms of whether bifurcation makes sense, we don't
9 think so because now that we have moved forward on
10 discovery -- as your Honor saw, we just filed our *Markman*
11 brief.

12 **THE COURT:** Yes.

13 **MR. PAK:** There's been lots of discovery that's been
14 produced pursuant to your Honor's order on the consolidation
15 or cross-use of discovery from the ITC cases.

16 **THE COURT:** Yes.

17 **MR. PAK:** There was an ITC trial that took place.
18 There's one coming up now, all of that, we've been working
19 very diligently to go through those documents, understand
20 where we need to take additional depositions, where we don't.
21 That's been incredibly helpful to us.

22 Lot of the reason why you haven't seen depositions being
23 taken at this point or, you know, frankly from Cisco's
24 perspective why we haven't pushed for additional documents is
25 there are hundreds of thousands of documents that have already

1 been produced by both -- both sides and now part of the record
2 in this case. And a lot of that is very, very helpful to the
3 questions at issue in this case with respect to the
4 development of CLI, the decisions that were made by Arista to
5 copy the technology and all of that has really, from our
6 perspective, moved the ball forward.

7 And with respect to the patent case, as, your Honor, we
8 talked about before, there's substantial overlap between the
9 copyright claims which cover the command interfaces or the
10 expression that the user sees versus the patents which go to
11 the underlying technology as to those commands are then
12 translated into specific code instructions to enable the
13 technology to work together.

14 So at this point, from our -- from our perspective, your
15 Honor, we -- we think that fall of 2017 would be a incredibly
16 prejudicial delay for us. We think that -- we'd like to move
17 forward in August of 2016. The concerns that Mr. Van Nest
18 raised I think were -- are not significant concerns in terms
19 of the amount of discovery that we still have left in this
20 case.

21 And I'm going to let Mr. Neukom address some of those
22 concerns specifically --

23 **THE COURT:** Okay.

24 **MR. PAK:** -- 'Cause I think we've addressed in our
25 papers, but there's a lot of background here that I think

1 could be beneficial to your Honor's consideration.

2 **THE COURT:** All right. Go ahead.

3 **MR. NEUKOM:** Well, your Honor, I have a number of
4 points I'd like to cover briefly, although I want to make sure
5 I'm being responsive to your Honor's particular question,
6 which I think was the interplay between copyright and patent.

7 **THE COURT:** Yes.

8 **MR. NEUKOM:** Which I think Mr. Pak addressed.

9 **THE COURT:** And I know we went through this at the
10 initial case management conference. I know these issues were
11 before us, but cases mature so --

12 **MR. NEUKOM:** So dovetailing I hope what Mr. Pak just
13 expressed to the court, there are a few points that Cisco
14 would like to make to this court.

15 The first is we are talking about direct competitors here.
16 This situation invites some gallows humor about how direct of
17 competitors they are that Cisco is alleging that Arista is in
18 the market founded by former Cisco employees selling products
19 using Cisco's copyrighted and patented technology.

20 I note at the outset that these companies are direct
21 competitors for two reasons. The first is to underscore the
22 importance to Cisco of this case and the timeliness of the
23 adjudication of its claims.

24 The second is we've noticed in some of your Honor's
25 writings that whether the parties are direct competitors is

1 relevant to the question of --

2 **THE COURT:** I take that from the established law.

3 **MR. NEUKOM:** -- of the court's willingness to stay a
4 case.

5 Let me just cover, if I may, a few points that are made by
6 the parties in -- in the joint case submission.

7 First is the suggestion that the scope of this case and
8 the copyright case has changed. In any respect or even in
9 particular with respect to Judge Grewal's discovery ruling,
10 the scope of the case has not changed. Looking back ten
11 months to Cisco's initial complaint, Cisco identified 26
12 copyrighted works. Cisco identified 500 command line
13 expressions. And Cisco has not expanded the scope of that
14 case.

15 Even at that time, certainly Arista, being founded by a
16 fraternity if you will of former Cisco employees, would know
17 that these were works for hire, that they were works for hire
18 that were contributed to by a number of engineers.

19 And I can't resist noting here that these engineers are
20 not authors under the law for copyright protection. Cisco is
21 the author of every single one of these works and the command
22 line expressions.

23 The question that was brought to Judge Grewal was in an
24 interrogatory asking for a detailed explanation of every
25 engineer who contributed to the reduction of source code going

1 back from the late '80's for a 20-plus year history, which
2 engineers, for example, checked in which source code
3 containing which command line expression.

4 We thought your Honor may not be surprised to know that I
5 still think that that interrogatory was improper and overly
6 burdensome. Judge Grewal disagreed, and his opinion matters a
7 lot more than me, so Cisco complied.

8 We complied with, pardon the expression, an outlandish
9 interrogatory response. The interrogatory response is
10 something like over 200 pages. It is supported by a table
11 with detailed data of over 1,000 pages of information.

12 Now, what Arista has learned from that shouldn't have been
13 a surprise. And it is that over 26 copyrighted Cisco works
14 which tell the story of the history of routeing and switching
15 and a command line user experience for the engineers running
16 those networks. Lots of Cisco engineers contributed to the
17 development of those products.

18 Now, given that the scope of this case hasn't changed from
19 day one, I think what's really before this court are two
20 questions, and they've been presented to this court as though
21 they are one-to-one related.

22 The two questions are No. 1, whether the deposition
23 allowance should be moved from 10 to 60, and the second is
24 whether the case schedule should be changed substantially.

25 On the issue of whether the depositions should be moved

1 from 10 to 60, I have two objections to that. One is
2 procedural and the other is substantive.

3 Procedurally, this is -- this is an odd request by my
4 lights (sic). This is a request for a blank check. You have
5 a party that has not taken a single deposition yet of the ten
6 afforded to it and is asking for an additional 50 on top of
7 that.

8 If -- If Arista would like more than ten depositions --
9 perhaps over the next three and a half months, each side will
10 need a few more than ten depositions. But if they do, I
11 believe that the lawyer's answer to that is to take the ten
12 you need and if you need a few more, identify what you need
13 and why.

14 And I bet Cisco will be pretty darned reasonable about
15 that at the appropriate point in time. But to ask the court
16 as an initial matter, having taken no depositions, to explode
17 to 60 depositions, 420 hours per side, 840 hours of deposition
18 time total? Procedurally makes no sense.

19 Substantively, I continue to have a hard time
20 understanding how that number of depositions would be
21 appropriate.

22 Just by way of comparison, I -- I think in the last 20
23 years, the biggest copyright case in this district was a case
24 by Oracle asserting copyright protection over Java. And I
25 believe Mr. Van Nest and his colleagues were counsel in that

1 case. And I could be wrong about this. I've pieced this
2 together from looking at the docket. From what I can tell, it
3 looks to me like there was something like 16 depositions per
4 side in that case.

5 I say that was the biggest case in the last 20 years.
6 Before that, the biggest copyright case in this district, I
7 believe, was *Apple v. Microsoft*. And I just conferred with
8 lead counsel for Microsoft in that case, a lawyer named David
9 McDonald up in Seattle, and asked him what the depositions
10 were like in that case. And he said that Judge Walker gave
11 each side 60 days only to perform any and all depositions they
12 could.

13 Now, we're talking about copyright cases covering Java,
14 covering Windows, covering Apple's operating system. Trial
15 counsel and the parties in those cases were able to get
16 through discovery meaningfully with a small fraction of what
17 Arista is asking for in this case. And I believe that if
18 counsel can work together, we can do the same thing here.

19 **THE COURT:** All right.

20 **MR. NEUKOM:** And I've been talking a bit. I have
21 more comments, but let me -- let me pump the brakes for a
22 moment to give Mr. Van Nest or your Honor an opportunity.

23 **THE COURT:** And Mr. Van Nest, absent a discovery
24 plan, I would be reluctant if not intransigent on not granting
25 the requests for additional depositions.

1 **MR. VAN NEST:** Well, here's the thing, your Honor.
2 The first deposition date they offered of a CLI author was
3 December 10th, so when Counsel says Arista hasn't not taken
4 any depositions, we've been begging to get dates and haven't
5 gotten any. The earliest date is December 10th.

6 **THE COURT:** Well, and that's a concern to me about
7 your claims construction, and I know you suggest that you need
8 some depositions in order to brief --

9 **MR. VAN NEST:** We do.

10 **THE COURT:** -- claims construction. That -- It's a
11 little different issue than what Mr. Neukom was addressing.
12 And -- And perhaps you would agree that the expanded number of
13 depositions is a matter to decide on another day when -- when
14 you can present a plan that would allow me to consider it.

15 **MR. VAN NEST:** We can certainly present a plan, your
16 Honor, but here's my concern. I'll take the issues
17 separately.

18 **THE COURT:** Okay.

19 **MR. VAN NEST:** First the timing.

20 **THE COURT:** Sure.

21 **MR. VAN NEST:** Then the numbers.

22 **THE COURT:** Okay.

23 **MR. VAN NEST:** The timing is not urgent. This
24 product has been on the market since 2008. They waited to
25 file their lawsuit six years after the product was out, so the

1 idea that there's some urgency here is absolute nonsense.

2 The reason we're seeking additional time is two-fold.

3 One, we filed an IPR on one of the two patents. We intend to
4 file an IPR on the second patent next week. It doesn't make
5 sense to go forward with all the *Markman* work and all the
6 patent work until we know whether or not the IPR's will be
7 initiated. That decision will be in May.

8 So one of the reasons to move everything back -- and I'm
9 not asking for things to be severed at this point -- to move
10 everything back is to give us a breather on the patent side
11 and avoid unnecessary work that we're going to be doing,
12 particularly if the IPR's are allowed, they're initiated and
13 patent claims change. That's just very simple.

14 With respect to the copyright, though, we started in
15 April. Counsel talks about cooperation. It took Judge Grewal
16 to get the information we need to even consider what the
17 discovery plan will be, and we just got it two weeks ago, and
18 it was 137 authors. And that's not all of them. There's
19 going to be more.

20 In this case, whether these commands are original or
21 creative is a big issue. IP address, set clock, show host.
22 These are some of the commands they claim are original to them
23 and copyright without. And we know that many of these
24 commands come directly from standards bodies. They come
25 directly from commands that were in use with Linux. They come

1 directly from other prior sorts of command structures. And so
2 it is --

3 **THE COURT:** But that's determined extrinsic to what
4 the authors are going to say. I don't know. I'll need to see
5 a thorough plan on these depositions if you're suggesting the
6 authors have anything to add.

7 **MR. VAN NEST:** I think -- I think the authors have a
8 lot to add, your Honor, because we don't know -- with 500 of
9 these commands, we have no idea which of the commands they're
10 going to feature in the trial, what authors are going to show
11 up. They gave us one author over the summer, and they've now
12 told us we can depose him on December 10th, so the reason we
13 don't know how much each author's going to add is we haven't
14 been able to depose any of them.

15 So I'm not saying that 60 is a magic number. Of course
16 not. But it does seem to me that to be productive in this
17 case, if we have any chance of -- of a trial any time next
18 year, we'd need to have a number like 20 or 25 to get started
19 so when we come back, we can say this is either tapped out and
20 no longer necessary, or we need more depositions than this.

21 Or -- because, remember, that 10 is for everything,
22 inventors, CLI, and the whole 9 yards. So -- So with respect
23 to the numbers, if you gave us 20 or 25 today as a starting
24 point, we could put a plan together, get some dates in place.
25 Next time we're here, we'd have a little more information.

1 With respect to the overall schedule, your Honor, again,
2 we'd be happy to have you stay the whole thing. But the
3 reason we didn't ask for that is obviously Cisco wants to get
4 their copyright case to trial. So what we're saying is
5 putting the patent case aside and understanding that we have
6 an IPR there, what makes sense when you hear the motion to
7 continue is to put this thing back five months or so, give us
8 the time we need to conduct discovery to defend these 500
9 commands and the hierarchies and the like.

10 And so all I'm asking today, your Honor, is to get a
11 date -- and it can be on the normal briefing calendar -- I'm
12 not asking for expedited or anything like that -- a date to
13 hear that motion sometime next month in December.

14 **THE COURT:** My calendars are booked until February.

15 **MR. VAN NEST:** That's --

16 **THE COURT:** That's a problem.

17 **MR. VAN NEST:** So we'd be perfectly willing to have
18 you decide that motion on the papers.

19 **THE COURT:** Um-hmm --

20 **MR. VAN NEST:** -- on a regular briefing calendar
21 where the briefing would be done in the next 30 days.

22 But I think in order to keep the case moving in light
23 of -- of these vast numbers of people that they've just now
24 disclosed two weeks ago, giving us some additional room so
25 that we can set some depositions, get started on that plan,

1 and come back to you with some more concrete information would
2 be good.

3 Remember, we started this in April. We just now got
4 answers two weeks ago, thanks to Judge Grewal. And so we're
5 confronting a situation where we may need to take up to 60
6 depositions.

7 **THE COURT:** Well, I'm not averse to allowing you to
8 have more than the ten, and in a case like this, I think it
9 can be reasonable. But you're, in a sense, asking me for a
10 blank check at this point. I don't know who you'll depose
11 first. You can come back after the 25 with the truly
12 essential people that you waited to depose till the end.

13 So I need a plan, and that's something that -- you know,
14 if I hadn't set this case management conference, I don't think
15 you were knocking on my door to have one set for the issue, so
16 I'm -- I'm willing to consider an expansion of the discovery,
17 but I need a plan.

18 **MR. VAN NEST:** We'll submit a plan, your Honor.

19 **THE COURT:** And I need to hear what Cisco's view of
20 it is before I make a determination. You had indicated that
21 there were some depositions you had been trying to obtain
22 before you responded --

23 **MR. VAN NEST:** That's right.

24 **THE COURT:** -- to the plaintiff's construction.
25 That, of course, is of utmost concern to me. And, again, if

1 you lose your slot for claims construction, I don't know
2 when -- I'd have to look at the calendar to see when I can get
3 that back in.

4 **MR. VAN NEST:** Mr. Krishnan has been directly
5 involved in talking to -- let me --

6 **THE COURT:** Okay.

7 **MR. VAN NEST:** 'Cause that is a more pressing issue
8 and one that if the *Markman* is not going to move that we need
9 to resolve soon.

10 **THE COURT:** Well, yes.

11 **MR. KRISHNAN:** Thank you, your Honor.

12 **THE COURT:** Good afternoon.

13 **MR. KRISHNAN:** So with regard to the inventor
14 depositions and claim contribution, the real issue here is
15 that Arista timely requested these -- inventor depositions
16 well before the cutoff.

17 **THE COURT:** And how many are we talking about that
18 you need for claims construction?

19 **MR. PAK:** Two.

20 **THE COURT:** Two.

21 **MR. KRISHNAN:** One of them has been already scheduled
22 for November 12th. That's next Thursday.

23 **THE COURT:** Good.

24 **MR. PAK:** Which is only two business days before our
25 opposition brief would be due. The other one we don't have a

1 date. That's Mr. TTjong, T-j-o-n-g, for the '886 patent.

2 **MR. NEUKOM:** And is he located --

3 **MR. PAK:** I believe he's in the Bay Area.

4 **THE COURT:** Oh, he's in the Bay Area.

5 **MR. KRISHNAN:** But -- But we don't have a date, and
6 what we would be willing to do is to submit our opposition
7 claim construction brief five business days after the last of
8 these two depositions, whenever that is.

9 We'd ask that we get Mr. John's deposition in the next two
10 weeks, and then five business days after which ever one is
11 second.

12 **THE COURT:** Well, my -- my concern is that the claims
13 construction be fully briefed by probably around January 10th,
14 so that does give more time than your current schedule to do
15 the briefing.

16 At least I believe it does, Mr. Neukom. I don't know when
17 your reply would have been due.

18 **MR. NEUKOM:** I think it's one week later.

19 **THE COURT:** I don't need it fully briefed before a
20 month before the tutorial, so I think there's a little play
21 here. And, Mr. Neukom, can this second deposition be set in
22 November?

23 **MR. NEUKOM:** Yes, your Honor.

24 **MR. PAK:** Actually, yes --

25 (Simultaneous colloquy.)

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1 **THE COURT:** That's right.

2 **MR. NEUKOM:** I'll find out if I'm allowed back in the
3 office.

4 Mr. Tjong, we don't -- we offered Mr. Tjong for earlier
5 this week.

6 **THE COURT:** Okay.

7 **MR. NEUKOM:** That didn't work. To be fair, that
8 was -- it was on a quick turnaround, although it was pretty
9 quickly after we learned they wanted Mr. Tjong instead of
10 Mr. Bettadapur. Our understanding is Mr. Tjong may be headed
11 to India for a multi-week stretch, so I'm -- I want to be
12 careful what I'm promising to the court. I'm not sure that we
13 can put Mr. Tjong up in November.

14 What I would propose would be as follows: We will produce
15 Mr. Tjong for a deposition on the first available date, and we
16 will -- shy of disrupting a trip to India, we will move
17 mountains to make sure that gets done.

18 **THE COURT:** Here's all I need to do, and then I like
19 to put this back in your hands while you work out the
20 calendar. If the final brief -- reply brief is filed no later
21 than January 8th, I will allow you to set the rest of the
22 briefing schedule that presumes that these two depositions
23 will take place in sufficient time for Arista to consider them
24 and utilize them if anything is productive.

25 **MR. NEUKOM:** We'll do that, your Honor.

1 **THE COURT:** All right. Then that is fine. I'm
2 not -- I'm not prepared to rule on your motion to stay based
3 on the IPR filing. It's not -- I don't think anyone expected
4 that.

5 **MR. VAN NEST:** That's right.

6 **THE COURT:** And it is obviously more difficult in
7 advance of IPR being granted, although I have done that. But
8 often, that's when those are the only issues in the case. And
9 here, this is a -- obviously a hybrid with the copyright
10 claims being made.

11 That means, though, that -- I mean, this train is just
12 moving down the tracks, Mr. Van Nest. I don't know that the
13 *Markman* gets taken off track based on your motion to stay. I
14 just don't -- you'll -- you have to file that motion. I think
15 it is appropriate for that to be submitted without argument.
16 There's not much more to say. There are factors to consider.

17 **MR. VAN NEST:** You'll have -- I mean, it's really in
18 your hands. You know when the *Markman* is.

19 **THE COURT:** Yeah.

20 **MR. VAN NEST:** The brief has been filed. We filed it
21 yesterday.

22 **THE COURT:** Oh, all right.

23 **MR. VAN NEST:** We've got it. They'll respond under
24 the rules, and you'll have -- and we'll reply.

25 **THE COURT:** Okay.

1 **MR. VAN NEST:** And you'll have it -- by early
2 December, you'll have all the briefing. If you find an open
3 date and want to hear from us, we're happy to come down. If
4 you can decide it on the papers, decide it on the papers.
5 It's really a question of convenience and effort.

6 The -- That motion addresses both issues. It addresses
7 the patent case and seeks a stay of the patent case --

8 **THE COURT:** Okay.

9 **MR. VAN NEST:** -- pending the IPR. And it seeks a
10 short five-month delay of the copyright case for reasons I've
11 had outlined this morning. They're all in that one motion.

12 So --

13 **THE COURT:** Just -- while you're here -- and I'm -- I
14 think it's highly unlikely that a -- so five months would move
15 you in -- just after the first of the year.

16 **MR. VAN NEST:** It would, right. Although the date we
17 proposed for trial was in the middle of January.

18 **THE COURT:** Well, they talk about the disappearing
19 jury trial. I'm not seeing it.

20 (Laughter.)

21 **MR. VAN NEST:** Me neither, your Honor.

22 **THE COURT:** We have four trials going on right now in
23 this courthouse. If you count the number of judges, you get a
24 sense of how busy we are.

25 **MR. VAN NEST:** We're all happy to see that, your

1 Honor.

2 **THE COURT:** As I am as well. I certainly agree.

3 And that is -- Unfortunately, my calendar is most impacted
4 in that time period. And I would not even -- And you would
5 never be the only case set for trial ever. That just doesn't
6 happen.

7 **MR. VAN NEST:** We're used to that.

8 **THE COURT:** Of course you are. And I'm trying to
9 keep it to two so that there's a higher chance that you'll get
10 out on the date you're set. I actually realistically wouldn't
11 be able to set it until June of 2017, and if I were just --
12 and more comfortably in September when my -- or August -- I'd
13 delay it a year, so that's -- that is -- when you write --
14 when you provide the opposition and -- and the reply, I want
15 you to keep in mind my review of the calendar is it's not
16 really a five-month delay, so that's a -- that becomes a
17 problem.

18 **MR. VAN NEST:** Are there windows earlier than that
19 that are open?

20 **THE COURT:** I'm not seeing any windows earlier. I
21 think June is a window, but September --

22 **MR. VAN NEST:** June of 2017?

23 **THE COURT:** Of '17.

24 **MR. VAN NEST:** And then --

25 **THE COURT:** And I mean, I didn't look later in '16

1 because --

2 (Pause in the proceedings.)

3 **THE COURT:** Well, I'm not -- I mean, I have only one
4 other case set on November 28. How long a trial would this
5 be?

6 **MR. VAN NEST:** I would say --

7 **THE COURT:** I mean, I'll reduce --

8 **MR. PAK:** Two-week trial, your honor. That's what we
9 contemplate.

10 **THE COURT:** Oh, two weeks.

11 **MR. VAN NEST:** If it's everything.

12 **THE COURT:** Everything.

13 **MR. VAN NEST:** Two to three weeks. Two weeks, three
14 weeks, somewhere in that.

15 **THE COURT:** Well, I have a three-week trial set for
16 November 28, but it's the only one I have set then. And it's
17 not -- I don't know which one would have priority. That's not
18 something I can decide. And I don't know if the other one
19 will still be pending. And so that is a window that I could
20 consider.

21 **MR. VAN NEST:** We'll -- We'd take that. We'd take
22 that.

23 **THE COURT:** And then -- remind me of it in your
24 briefs. I won't --

25 **MR. VAN NEST:** November 28th.

1 **THE COURT:** November 28, I'll make a note of it.

2 **MR. VAN NEST:** We will, your Honor. And please hold
3 it.

4 **MR. NEUKOM:** If I may, your Honor, from Cisco --

5 **THE COURT:** Yeah. Yeah, I'll make a notation. But
6 I'm not -- right now, I haven't heard anything that would
7 cause me to grant that continuance, and I'm not ruling on it
8 now. I just wanted you to have some dates in mind, because
9 especially for -- I think it's especially important for Cisco
10 in considering the factors of prejudice, it's one thing to
11 argue a five-month prejudice. It's another to be arguing a
12 one year. And if it's realistically a year, then -- then
13 that's a concern.

14 If it's -- I mean, if it's only three months because of
15 the November date and you've got to go back to your experts
16 and -- to see if they're even available, I think the motion is
17 best briefed if you have some dates.

18 **MR. VAN NEST:** Well, we'll -- we'll keep that in mind
19 in the briefing, your Honor, and mention it again in the
20 reply. But that date would work for us.

21 **MR. PAK:** And -- And, your Honor, this is Sean Pak.

22 But, you know, again, we certainly appreciate your
23 calendar, your Honor. And I think that -- you know, the big
24 concern would be setting anything that's contingent upon
25 another case settling.

1 **THE COURT:** Well, you won't --

2 **MR. PAK:** Somehow that other case --

3 **THE COURT:** You know, Mr. Pak, whatever date you have
4 and your August date, I don't know whether they're -- let me
5 look at your August date and tell you what your competition is
6 then. I mean, it's -- it's unfortunate --

7 **MR. PAK:** It is.

8 **THE COURT:** I have only -- Well, you overlap with two
9 different cases. You overlap with one other patent case --
10 Well, that would be grim, to go from one to the next. And
11 then -- And you only -- you're only in competition with a case
12 that's either currently being tried or the one set on your
13 first day, and so you would be competing in your August date
14 with another patent case, which is set to run through the week
15 of August 1st.

16 Oh, actually August 1st and August 8th, so it's a -- it's
17 an overlap with yours. And I don't know what's going to
18 happen with theirs, so, you know, I -- if I set one case at a
19 time, you'd be looking at a seven- or eight-year trial
20 schedule, so, of course, we don't have --

21 **MR. PAK:** Right. No, we appreciate that, and --

22 **THE COURT:** Yeah.

23 **MR. PAK:** And, again, your Honor, you know,
24 everything I've heard today, we are -- we are committed on
25 Cisco's part to give the discovery that's necessary, but --

1 **THE COURT:** Good.

2 **MR. PAK:** Again, you know, this is -- the date is
3 important to us. We were here before your Honor talking about
4 ways to try to bifurcate the claims to try to get resolution
5 on the copyright claims. They opposed that. We ultimately
6 decided on this date as a compromise to get us the best of
7 both worlds, where we can get an early trial date, yet have
8 the cases tried together in front of a jury.

9 **THE COURT:** Sure.

10 **MR. PAK:** And we've worked really hard to make that
11 happen. And I think that, you know, it's important for us to
12 have a date. We will respond in kind to anything that
13 Mr. Van Nest proposes.

14 **THE COURT:** Okay.

15 **MR. PAK:** Again, you know, from Cisco's perspective,
16 it's very important to have a date.

17 **MR. VAN NEST:** I would just say this, your Honor. I
18 can't resist.

19 If that date were important, why in the world has taken me
20 six months to get this basic date information? It took me six
21 months after we serve a rog in April. And counsel for Cisco
22 know we fought them all summer long to get this information.
23 And only reluctantly, did we go to Judge Grewal who granted
24 the motion in its entirety and said this stuff should have
25 been provided months ago.

1 **THE COURT:** Well, and that's something that I need to
2 take into consideration as -- in looking, I will certainly
3 look back at the discovery orders.

4 Mr. Pak, that commitment needs to really be borne out so
5 that Arista gets the discovery it needs, because I mean, it
6 would really be a shame to then go through claims construction
7 only to have a continuance at that point.

8 This is where Arista's feeling had it could benefit from
9 additional time and to deprive them of it now only to
10 inevitably get to that continuance would not make much sense.

11 **MR. PAK:** Absolutely, your Honor. And, you know,
12 just so you understand, your Honor, on the -- on the patent
13 side of the case, both sides actually, even without your
14 Honor's intervention, have agreed to a narrowing of both
15 claims --

16 **THE COURT:** Okay.

17 **MR. PAK:** -- asserted claims, as well as prior art.

18 We just sent them a proposal or a agreement -- I think it
19 was just earlier this week where we dropped our claims down to
20 a much more reasonable number. They have agreed to -- to
21 respond in kind --

22 (Simultaneous colloquy.)

23 **MR. PAK:** -- number of prior art.

24 That's all under way. We have no problems accommodating
25 them on the inventor depositions.

1 On this issue, you know, frankly, Mr. Van Nest has -- he
2 and I have tried cases together. I know him very well. He
3 hasn't been involved in these discovery issues. I been
4 involved. I've spoken with his colleagues. We have told him
5 their -- their team from day one, the most important people
6 including Mr. Loughheed, whose deposition will be taken shortly
7 here -- his name was mentioned many, many months ago as the
8 principal person who knows the entire story with respect to
9 how the CLI development process began. He was one of the
10 original architects of that. He can describe in detail the
11 creative process, the way in which commands expressions are
12 authored and vetted within Cisco.

13 The bar for copyright-ability, as Mr. Neukom said, it's
14 very, very low and that it's federal circuit law that it is --
15 that Ninth Circuit law and that's something that we have to
16 keep in mind that just because you can take 200 depositions
17 doesn't mean that you need 200 depositions to try the case.

18 **THE COURT:** All right.

19 Well, and I have one last request. I believe that in
20 filing your joint claims construction statement, that you each
21 have filed your own separate chart for me. And I'm going to
22 ask -- a document that's very helpful to me is a single
23 document on the terms that I'm going to construe, that states
24 the term and provides each of your proposed constructions on a
25 page in a chart form.

1 And I don't want the evidence recited. I want the
2 citation to the evidence. So if it's column and line number
3 or a or -- some people have misunderstood me and recited the
4 evidence. I don't want that. So this is -- it should be one
5 page per claim. That is my index to working with it.

6 And I am -- Maybe it would never have occurred to you to
7 do it otherwise, but whatever order the claims are discussed
8 in the opening brief must remain the order. And the numbering
9 must be consistent, so if it's A through G, you have had to
10 repeated A through G. I don't want numbers and letters.

11 **MR. VAN NEST:** No.

12 **THE COURT:** Because it seems like a small thing, but
13 it makes a big difference when we're really trying to compare
14 your argument. So if -- and I -- I just would like that --
15 that joint document -- I don't need it till January actually.
16 I'm not going to turn to this till then. So lots of time, and
17 you may -- I mean, sometimes through the briefing process, the
18 proposed construction changes. So it's really --

19 **MR. PAK:** Right.

20 **THE COURT:** -- nice for you to wait and even though
21 you -- I know it makes the other side crazy when that happens,
22 but I'd like -- well, it seems to happen in most cases. I'd
23 like the proposed -- the final proposed construction that I'm
24 going to be dealing with -- and if you feel compelled to put
25 the disclosed construction and then the amended, I don't mind

1 that at all. Just make it clear, but that document will help
2 me enormously so I do appreciate --

3 **MR. VAN NEST:** We'll do it.

4 (Simultaneous colloquy.)

5 **MR. KRISHNAN:** Your Honor, there is one last issue --

6 **MR. PAK:** We'll make that happen, your Honor.

7 **THE COURT:** Thank you.

8 **MR. KRISHNAN:** -- about claim construction, which
9 is -- it was the third item mentioned in the CMC statement,
10 which is the declaration of Mr. Almeroth, the Cisco expert --

11 **THE COURT:** Right.

12 **MR. KRISHNAN:** -- which was submitted on Monday.
13 That was undisclosed opinion. It also includes undisclosed
14 extrinsic evidence in there. And we think the declaration
15 should be stricken. It was simply in violation of the rules.
16 They didn't disclose it at the proper time.

17 **THE COURT:** I think I'm going to have to have you
18 pose those objections in the context of the briefing.

19 **MR. KRISHNAN:** Okay.

20 **THE COURT:** I'm not prepared to review that at this
21 point. And I think they'll take their chances on whether it's
22 in or out, just like with any other objection.

23 **MR. VAN NEST:** Fair enough.

24 **THE COURT:** Okay?

25 **MR. VAN NEST:** Your Honor, we'll submit a discovery

1 plan within a week.

2 **THE COURT:** Okay.

3 **MR. VAN NEST:** And so by close of business next
4 Thursday, you'll have that plan. And it will be a supplement
5 to our motion. We'll just -- We'll file it as a pleading, but
6 it will be supplemental to the motion we file.

7 **THE COURT:** I think -- Is that acceptable?

8 **MR. NEUKOM:** That is. Although that relates to one
9 bit of guidance I was going to ask the court for from both
10 sides.

11 **THE COURT:** Okay.

12 **MR. NEUKOM:** To say that Cisco is -- is insistent
13 upon the first available trial date, including in August,
14 would be an understatement. And I think your Honor has heard
15 that from us.

16 **THE COURT:** I have.

17 **MR. NEUKOM:** While there is -- and we will file an
18 opposition to the motion to, in effect, ice the case for a
19 year or two in due course.

20 But what I'm hopeful of the guidance that the parties can
21 get from the court today is I want to make sure that while
22 that motion is pending, the parties are instructed to conduct
23 themselves as though the close of fact discovery is February
24 26th. We are open for business. There have been some
25 unfortunate or inadvertent representations about what Cisco

1 has or hasn't produced in this case. We will correct those
2 misimpressions with our briefing.

3 In the meantime, we have Keker Van Nest and Quinn Emanuel
4 on either side to the caption and we have three months of fact
5 discovery remaining. I am confident that if both sides want
6 to hit that fact discovery deadline, it can be done.

7 **THE COURT:** I have no doubt.

8 You know, and -- I would consider it no other way. I --
9 And, in fact, it's -- generally, I would be -- would look
10 negatively about granting a motion to stay. I haven't read
11 the motion. I haven't seen the -- the reasons for it. I'm
12 not ruling on it now, but -- and if either side bets on the
13 outcome of the motion to stay and comes up short, it won't be
14 grounds for a continuance of the discovery deadlines, so -- I
15 think you all know that.

16 All right.

17 **MR. VAN NEST:** Thank you, your Honor.

18 **THE COURT:** And I know you have the resources to make
19 this happen.

20 **MR. VAN NEST:** Thank you, your Honor.

21 **THE COURT:** Thank you so much.

22 **MR. PAK:** Thank you, your Honor.

23 **MR. KRISHNAN:** Can I -- Can I interject one other
24 question about guidance?

25 **THE COURT:** Sure.

1 **MR. KRISHNAN:** The tutorial, can -- can your Honor
2 give us some guidance about how she would prefer the tutorial
3 in terms of experts on the record.

4 **THE COURT:** You know, I'm getting to the point where
5 I actually don't want it on the record. I actually don't want
6 either of you to be bringing a record back and -- and making
7 that part of it. You're doing this for me. And my experience
8 up till now, although it's far less than your experience, is
9 that the attorneys are able to make the science more
10 understandable to me than the experts. And the experts come
11 in, teaching me a Ph.D. course in an hour, and they realize I
12 haven't studied this since high school. So we had a little
13 bit of a gap. And so if they dumb it down to college, I'm
14 still struggling.

15 I find as attorneys, I think you have a much better
16 understanding of what it's going to take to give me the
17 information I need. And I don't need to be down in the weeds
18 on some of the science. I need to be able to construe the
19 terms.

20 So I have had better luck with attorneys, but if you have
21 an expert who is really going to guide me through it, that
22 will be up to you to decide. Thank you for asking that.

23 And I found that an hour per side is generally enough.
24 It's not a -- I don't have the clock running, but that's
25 typically been fine. And I don't think -- it's just two

1 patents, isn't it?

2 **MR. VAN NEST:** Yes.

3 **MR. PAK:** That's right.

4 **THE COURT:** We're not dealing with a broader array of
5 science than I get in some cases, so that can be your guide.
6 And if I'm in trial, I'll bump you to the afternoon, but that
7 would be the worse thing that would happen on that.

8 **MR. VAN NEST:** Thank you, your Honor.

9 **THE COURT:** Thank you so much.

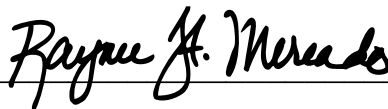
10 **MR. PAK:** Thank you.

11 (Proceedings were concluded at 2:45 P.M.)

12 --o0o--

13
14 **CERTIFICATE OF REPORTER**

15 I certify that the foregoing is a correct transcript
16 from the record of proceedings in the above-entitled matter.
17 I further certify that I am neither counsel for, related to,
18 nor employed by any of the parties to the action in which this
19 hearing was taken, and further that I am not financially nor
20 otherwise interested in the outcome of the action.

21
22 

23 Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

24 Monday, November 9, 2015